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SAFELINE MONITORS, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RADIATION DETECTION COMPANY, a Texas company,

Plaintiff,

v.

SAFELINE MONITORS, LLC, a Connecticut company, and Does 1-5,

Defendants.

Case No. 3:22-CV-07784-TLT

NOTICE OF MOTION AND MOTION BY DEFENDANT SAFELINE MONITORS, LLC FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 26, 2024
Time: 2:00 p.m.
Courtroom 9, 19th Floor
The Hon. Trina L. Thompson

Complaint Filed: February 12, 2022
Trial Date: October 15, 2024

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NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 26, 2024, at 2:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 9, 19th Floor of the above-entitled Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, Defendant Safeline Monitors, LLC ("Defendant") will and hereby does move the Court for summary judgment as follows:

1. That Defendant is entitled to partial summary judgment as to Plaintiff's first cause of action for breach of contract on the ground that, based on undisputed evidence and applicable law, defendant did not deny Plaintiff the opportunity to exercise a right of first refusal.

2. That Defendant is entitled to summary judgment as to Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing on the ground that said cause of action is duplicative of Plaintiff's cause of action for breach of contract.

3. That Defendant is entitled to summary judgment as to Plaintiff's third cause of action for fraud in the inducement on the ground that there is no evidence that Defendant made a false promise to Plaintiff.

4. That Defendant is entitled to partial summary judgment establishing Plaintiff is not entitled to lost profits damages on the ground that the parties' contract contains a limitation of liability provision that expressly prohibits the recovery of lost profits or revenue in any action in contract or tort.

This motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the accompanying declarations of Ben Herbstman and Louis Biacchi, the Court's file and records in this action, and on such argument and as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Radiation Detection Company ("Plaintiff" or "RDC"), in its Complaint for Breach of Contract and Fraud in the Inducement ("Complaint")—which was originally filed in San Francisco Superior Court and subsequently removed to this Court—alleges causes of action for

breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud in the inducement against Defendant Safeline Monitors, LLC ("Defendant" or "Safeline"). The gravamen of the Complaint is Safeline's alleged failure to give RDC the opportunity to exercise a purported "right of first refusal" when Ben Herbstman, the owner of Safeline, sold all of his membership interests of Safeline to Mirion Technologies (GSD), Inc. ("Mirion") and Safeline became a wholly-owned subsidiary of Mirion.

The right of first refusal, by its terms, would be triggered "[s]hould [Safeline] elect to sell their business while in contract with RDC." As explained herein, the right of first refusal was never triggered because Safeline did not sell its business. As a matter of law, Ben Herbstman's sale of his membership interests of Safeline to Mirion was not a sale by Safeline of its business. Safeline is therefore entitled to summary judgment as to all the causes of action alleged by RDC except for part of the breach of contract claim regarding RDC's confidential and proprietary information.

In addition, the contract between RDC and Safeline contains a limitation of liability clause which provides, among other things, that neither party would be liable for damages for loss of profits or revenue, whether in an action for contract or tort. Such clauses are enforceable under California law. RDC should therefore be precluded from recovering any such damages from Safeline.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether Defendant is entitled to partial summary judgment as to Plaintiff's first cause of action for breach of contract on the ground that, based on undisputed evidence and applicable law, defendant did not deny Plaintiff the opportunity to exercise a right of first refusal.

Whether Defendant is entitled to summary judgment as to Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing on the ground that said cause of action is duplicative of Plaintiff's cause of action for breach of contract.

Whether Defendant is entitled to summary judgment as to Plaintiff's third cause of action for fraud in the inducement on the ground that there is no evidence that Defendant made a false promise to Plaintiff.

Whether Defendant is entitled to partial summary judgment establishing Plaintiff is not entitled to lost profits damages on the ground that the parties' contract contains a limitation of liability provision that expressly prohibits the recovery of lost profits or revenue in any action in contract or tort.

III. STATEMENT OF FACTS

On July 23, 2007, Safeline was formed as a Connecticut limited liability company by Ben Herbstman. Declaration of Ben Herbstman in Support of Defendant Safeline Monitors, LLC's Motion for Partial Summary Judgment ("Herbstman Decl."), ¶ 3 and Ex. A. From that time until December 1, 2021, Mr. Herbstman was the President, Manager, and sole member of Safeline and responsible for the business and affairs of the company, including its day-to-day operations. *Id.* ¶ 1.

Safeline operates a dosimetry service. *Id.* ¶ 2. A dosimeter is a device for measuring doses of radiation, such as from X-rays. *Id*. The device is a badge that a person would wear. *Id*.

On August 17, 2007, Safeline entered into a Dosimetry Resale Agreement (the "Agreement") with RDC. *Id.* ¶ 4 and Ex. C. Mr. Herbstman signed the Agreement as President of Safeline. *Id*. At that time, RDC was located in Gilroy, California and its President was Barrie Laing. *Id*. Under the Agreement, Safeline was to (and did) market, solicit, and resell RDC's dosimetry reading and reporting services to new customers. *Id*. The initial term of the Agreement was for three years. *Id.* After the initial term, Safeline and RDC would periodically renew the Agreement. *Id.* The renewals typically established a new pricing structure for RDC's dosimetry services but otherwise did not make any material changes to the Agreement. *Id.*

On or about April 10, 2019, Safeline received a Reseller Renewal Letter (the "2019 Renewal") from RDC that included a new price list effective August 1, 2019 through June 30, 2021. *Id.* ¶ 5 and Ex. D.

On November 13, 2020, Mr. Herbstman received an e-mail from Robert Stefani, RDC's Director of Sales, that contained two documents, a Reseller Contract Revision (the "2020 Revision") and a new price list effective November 12, 2020. *Id.* ¶ 6 and Ex. E. Mr. Herbstman signed the 2020 Revision as Safeline's representative and sent it by e-mail to Mr. Stefani on

November 16, 2020. *Id.* That same day, Mr. Stefani sent a fully executed copy of the 2020 Revision to Mr. Herbstman by e-mail. *Id.* Mr. Stefani signed the 2020 Revision as RDC's representative. *Id.* ¶ 6 and Ex. F.

When Mr. Herbstman signed the 2020 Revision on behalf of Safeline, he did not see that it contained the following statement: "Should the Reseller elect to sell their business while in contract with RDC, Reseller agrees to offer RDC the first opportunity to purchase the business and the first right of refusal." *Id.* The e-mails sent by Mr. Stefani did not mention anything about this provision and Mr. Herbstman did not have a discussion with Mr. Stefani or anyone else at RDC regarding the so-called "first right of refusal." *Id.* Mr. Herbstman's primary concern whenever the Agreement was renewed was the price list, and that was his focus when he looked at the 2020 Revision. *Id.* In addition, at the time Mr. Herbstman signed the 2020 Revision on behalf of Safeline, he was not thinking about, and had not considered, a sale by Safeline of all or any part of its business. *Id.* Mr. Herbstman did not realize that the 2020 Revision contained a "first right of refusal" until sometime in mid-2022. *Id.*

In April 2021, Mr. Herbstman was contacted by Mirion about the possibility of Mirion acquiring Safeline. *Id.* ¶ 7. Prior to April 2021, Mr. Herbstman did not have any discussions with Mirion or anyone else about an acquisition of Safeline. *Id.*

In May 2021, Mr. Herbstman signed a Mutual Nondisclosure Agreement ("NDA") with Mirion in connection with the negotiations regarding Mirion's potential acquisition of Safeline. *Id.* ¶ 8.

On July 13, 2021, Mr. Herbstman signed a letter of intent ("LOI") with Mirion regarding Mirion's potential purchase of 100% of the outstanding membership interests of Safeline, all of which were owned by Mr. Herbstman. *Id.* ¶ 9 and Ex. G.

On December 1, 2021, Mr. Herbstman entered into a Membership Interest Purchase Agreement with Mirion for Mirion's purchase of all the outstanding membership interests of Safeline. *Id.* ¶ 10 and Ex. H.

After December 1, 2021, Mr. Herbstman no longer owned any membership interests of Safeline and he was no longer the President or Manager of Safeline. *Id.* ¶ 11.

Since Mirion's acquisition of all the membership interests of Safeline, Safeline has operated as a subsidiary of Mirion and has continued to do business with RDC. Declaration of Lou Biacchi in Support of Defendant Safeline Monitors, LLC's Motion for Partial Summary Judgment ("Biacchi Decl."), ¶ 1 and Ex. A.

On August 31, 2023, Safeline's name was changed to Dosimetry Badge, LLC. *Id.* ¶ 2 and Ex. B.

IV. ARGUMENT

A party may move for summary judgment (or partial summary judgment), identifying each claim (or the part of each claim), on which summary judgment is sought. Fed. R. Civ. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

A. Governing Law

As set forth in the Agreement (at Section 14.7) and admitted by RDC (see Complaint ¶ 5), this dispute is governed by California law.

B. Defendant Did Not Deny Plaintiff The Opportunity To Exercise A Right Of First Refusal

RDC alleges that Safeline breached the Agreement, as amended by the 2020 Revision, "by accepting an offer and being sold to [Mirion] without informing RDC and denying RDC the opportunity to exercise its right of first refusal. Complaint ¶¶ 41, 43.

A right of first refusal, also called a preemptive right, is the conditional right to acquire property, depending on the owner's willingness to sell. *Hartzheim v. Valley Land & Cattle Co*., 153 Cal.App.4th 383, 389 (2007). The holder of the right merely has the preference to purchase the property over other purchasers if the owner elects to sell the property; the right does not become an option to purchase until the owner of the property voluntarily decides to sell the

property and receives a bona fide offer to purchase it from a third party. *Id.* The contract terms dictate the particular circumstances that will trigger the right. *Id*.

Here, the purported right of first refusal would be triggered "[s]hould the Reseller elect to sell their business while in contract with RDC." That did not happen. The "Reseller" is Safeline and its business is selling dosimetry services. Ben Herbstman was not the "Reseller" and the sale of his membership interests of Safeline was not the sale of Safeline's business. Following the transfer of the membership interests to Mirion, Safeline continued to own its business.

A limited liability company, like a corporation, is recognized as a legal entity separate and apart from its members (i.e. its owners). See Cal. Corps. Code §§ 17701.04(a) ("A limited liability company is an entity distinct from its members."), 17701.05 ("a limited liability company … shall have all the powers of a natural person in carrying out its business activities"); Conn. Gen. Stat. Ann. §§ 34-243g(a) ("A limited liability company is an entity distinct from its member or members."), 34-243h(a) ("A limited liability company has … the power to do all things necessary or convenient to carry on its activities and affairs."); *Abrahim & Sons Enterprises v. Equilon Enterprises, LLC*, 292 F.3d 958, 962 (9th Cir. 2002) ("Members own and control most LLCs, yet the LLCs remain separate and distinct from their members. Indeed, the separate and distinct nature of LLCs is their reason for existence."); *In re Schaefers*, 623 B.R. 777, 783 (9th Cir. BAP 2020) ("limited liability company members have no interest in the company's assets"); *In re Woldeyohannes*, No. 3:22-cv-1030 (SRU), 2023 WL 8717014, at *7 (D. Conn. Dec. 18, 2023) ("However, even if the Debtor was a member, or the sole member of the LLC at the time of the sale, a limited liability company, under Connecticut Law, is "an entity distinct from its member or members," Conn. Gen. Stat. Ann. § 34-243g(a). Accordingly, it appears that the Debtor did not own the specific assets of [the LLC] that were identified in the Sale Order.").

Under California law, an individual stockholder selling their shares is not the same thing as a corporate entity selling its business or its assets. *U.S Cellular Inv. Co. v. GTE Mobilnet, Inc*., 281 F.3d 929, 935 (9th Cir. 2002) (citing *Richardson v. La Rancherita, Inc*., 98 Cal.App.3d 73, 79 (1979) and *Ser-Bye Corp. v. C.P. & G. Markets*, 78 Cal.App.2d 915, 918-921 (1947); see *North Valley Mall, LLC v. Longs Drugs Stores California, LLC*, 27 Cal.App.5th 598, 602 (2018)

(rejecting argument that reverse triangular merger resulted in transfer of target corporation's assets). As explained by the Ninth Circuit:

> The analysis in *Ser–Bye* and *Richardson* hinges not on the nature of the specific assets involved in the transfer, but on the nature of the entity owning the assets and with whom the contract was made. That is, the California courts in these cases recognized that when a party enters into an agreement with a corporation, it is presumed to do so with an understanding of the nature of the corporate form. In effectuating the reasonable expectation of the parties, the law presumes that if the parties intend to limit the corporation's ability to engage in a legitimate and normal corporate transaction, such a limitation will be specified.

U.S Cellular, 281 F.3d at 935. The distinction between a corporation and its assets and the narrow interpretation of right of first refusal clauses have led most courts considering the question to hold that the transfer of corporate stock does not trigger a right of first refusal that applies by its text to the assets of the corporation. *Kaiser v. Bowien*, 455 F.3d 1197, 1208 (10th Cir. 2006).

The result here should be no different. RDC seeks to conflate the individual shareholder, Mr. Herbstman, with the Safeline corporate entity. At most, RDC made an agreement with Safeline LLC about the entity selling its corporate assets. RDC did not make any agreement with Mr. Herbstman himself about Mr. Herbstman's stock ownership. RDC, as the sole author of the November 2020 renewal document, could have included language encompassing Mr. Herbstman's individual stock ownership within their desired "right of first refusal." RDC did not include any such language. RDC instead made an agreement only with Safeline LLC, relating only to Safeline's corporate assets. As a matter of law, the sale by Mr. Herbstman of his shares to Mirion did not trigger any "right of first refusal" that existed between RDC and Safeline LLC regarding Safeline's corporate assets. Safeline LLC was, and still is now, the owner of its business and its corporate assets.

C. Defendant Is Entitled To Summary Judgment As To Plaintiff's Second Cause Of Action For Breach Of The Implied Covenant OF Good Faith And Fair Dealing

RDC's cause of action for breach of the implied covenant of good faith and fair dealing is based on the same breach alleged in its cause of action for breach of contract and therefore fails as a matter of law.

RDC's breach of contract cause of action alleges that "Safeline breached the Agreement by accepting an offer and being sold to [Mirion] without informing RDC and denying RDC the opportunity to exercise its right of first refusal." Complaint ¶ 43. RDC's breach of the implied covenant cause of action for alleges that "Safeline knowingly interfered with RDC's right of first refusal under the Agreement by failing to inform RDC of Mirion's offer to purchase Safeline and by completing the sale without providing RDC an opportunity to exercise its rights." Complaint ¶ 49. Because the two causes of action are based on the same breach, the breach of the implied covenant cause of action is superfluous:

> "[A]lthough the California Supreme Court has held that a plaintiff may bring both a breach of contract claim and a claim for breach of the implied covenant of good faith and fair dealing, the Supreme Court has made clear that when both causes of action cite the same underlying breach, the implied covenant cause of action will be superfluous with the contract cause of action." *Landucci v. State Farm Ins. Co*., 65 F. Supp. 3d 694, 716 (N.D. Cal. 2014) (emphasis in original) (citing *Guz v. Bechtel Nat. Inc*., 24 Cal. 4th 317, 327, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (2000)). *Guz* explained that "where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." *Guz*, 24 Cal. 4th at 327, 100 Cal.Rptr.2d 352, 8 P.3d 1089. In other words, a claim alleging breach of the implied covenant of good faith and fair dealing must be based on a different breach than the breach of contract claim. *Landucci*, 65 F. Supp. 3d at 716.

Beluca Ventures LLC v. Einride Aktiebolag, 660 F.Supp.3d 898, 911 (N.D. Cal. 2023); see *Careau & Co. v. Security Pacific Business Credit, Inc*., 222 Cal.App.3d 1371, 1395 (1990) ("If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.").

For the foregoing reasons, Safeline is entitled to judgment as a matter of law as to RDC's second cause of action for breach of the implied covenant of good faith and fair dealing.

D. Defendant Is Entitled To Summary Judgment As To Plaintiff's Third Cause Of Action For Fraud In The Inducement

RDC's cause of action for fraud in the inducement attempts to allege promissory fraud. The alleged false promise is the purported right of first refusal in the 2020 Revision, which states:

"Should [Safeline] elect to sell their business while in contract with RDC, [Safeline] agrees to offer RDC the first opportunity to purchase the business and the right of first refusal." Complaint ¶ 52. RDC alleges, on information and belief, that Safeline "knew that this representation was untrue and that Safeline had no intention of offering RDC an opportunity to purchase its business." Complaint ¶ 53. RDC further alleges, on information and belief, that Safeline "offered RDC the right of first refusal to induce RDC into agreeing to the 2020 Amendment and continuing Safeline's exclusive resell relationship." Complaint ¶ 54.

A plaintiff asserting a claim for promissory fraud must plead and prove that the defendant made a promise to the plaintiff that the defendant had no intention of performing. *RHUB Commc'ns, Inc. v. Karon*, No. 16-cv-06669-BLF, 2017 WL 3382339, at *11 (N.D. Cal. Aug. 7, 2017); *UMG Recordings, Inc. v. Glob Eagle Entm't, Inc*., 117 F.Supp.3d 1092, 1109 (C.D. Cal. 2015). Nonperformance by the party making the promise is a required element of a claim for promissory fraud. *Areias v. Applied Underwriters, Inc*., No. 21-cv-00023-JST, 2021 WL 9598132, at *8 (N.D. Cal. Oct. 19, 2021). However, nonperformance alone is insufficient to establish fraudulent intent. *Id*.

For the reasons set forth at length above, RDC cannot prove nonperformance by Safeline. The purported right of first refusal could only have been triggered if Safeline sold its business. The undisputed fact is that Safeline did not sell its business. Therefore, there can be no claim of promissory fraud as alleged by RDC.

There is also is no evidence of fraudulent intent. In fact, the evidence is to the contrary. Ben Herbstman did not even realize that the 2020 Revision contained a right of first refusal until at least a year and a half after he sold his memberships interests of Safeline to Mirion. Herbstman Decl. ¶ 6. In addition, there is no evidence that Safeline offered RDC the right of first refusal to induce RDC into agreeing to the 2020 Revision. Rather, RDC prepared and sent the 2020 Revision to Safeline without any prior notice or discussion regarding the right of first refusal. *Id.* ¶ 6 and Exs. E-F. At the time, the relationship between Safeline and RDC was continuing under the 2019 Renewal, which included a price list that was valid for another six months or so. *Id.* ¶ 5 and Ex. D.

For the foregoing reasons, Safeline is entitled to judgment as a matter of law as to RDC's

third cause of action for fraudulent in the inducement.

E. Plaintiff Is Not Entitled To Damages For Lost Profits Or Revenue

The Agreement (at Section 9.2 on page 6 thereof) contains the following limitation of liability clause:

> IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS, REVENUE, DATA, OR USE, INCURRED BY EITHER PARTY OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT OR TORT OR BASED ON A WARRANTY, EVEN IF THE OTHER PARTY OR ANY OTHER PERSON HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. COMPANY'S LIABILITY FOR DAMAGES UNDER THIS AGREEMENT SHALL IN NO EVENT EXCEED THE AMOUNTS ACTUALLY PAID BY RESELLER TO COMPANY UNDER THIS AGREEMENT.

See Herbstman Decl., Ex. C.

Limitation of liability clauses "'have long been recognized as valid in California.'" *Food Safety Net Services v. Eco Safe Systems USA, Inc*., 209 Cal.App.4th 1118, 1126 (2012) (quoting *Markborough California, Inc. v. Superior Court*, 227 Cal.App.3d 705, 714 (1991)). With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy. *Id*.

Here, there is no evidence that RDC had unequal bargaining power. If anything, Safeline, as a reseller of RDC's dosimetry reading and reporting services, had far less bargaining power than RDC. This is plainly evidenced by the limitation of liability provision itself, which further limits RDC's damages under the Agreement to the amounts actually paid by Safeline to RDC under the Agreement.

In determining whether the limitation of liability clause is contrary to public policy, "courts consider such factors as whether the contract 'concerns a business of a type generally thought suitable for public regulation' and whether '[t]he party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.'" *Price v. Apple*, No. 21-cv-02846-HSG, 2023 WL

2671378, at *4 (N.D. Cal. Mar. 28, 2023) (quoting *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 98-99 (1963)). There are no such public policy considerations implicated here.

The limitation of liability clause in the Agreement prevents either party from being liable for lost profits or revenue, "whether in an action in contract or tort." RDC should therefor be precluded from recovering such damages against Safeline in this action.

V. CONCLUSION

For all the foregoing reasons, Defendant's motion for partial summary judgment should be granted in its entirety, and the Court should enter an order (1) establishing that Defendant did not breach the Agreement by denying Plaintiff the opportunity to exercise a right of first refusal, (2) that there is no genuine dispute as to any material fact and Defendant is entitled to judgment as a matter of law as to Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing, (3) that there is no genuine dispute as to any material fact and Defendant is entitled to judgment as a matter of law as to Plaintiff's third cause of action for and fraud in the inducement, and (4) establishing that Plaintiff is not entitled to recover damages for lost profits or revenue.

Dated: February 15, 2024

ROPERS MAJESKI PC

By: _____

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